Syarikat Makmur Alat-Alat Ganti Sdn Bhd v USF Hicom (M) Sdn Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO C-03–76 OF 2007
GOPAL SRI RAM, HELILIAH AND AHMAD MAAROP JJCA
28 APRIL 2008

Civil Procedure — Appeal — Leave to defend — Whether involved question of law and disputes of facts — Whether defend lacks bona fides — Whether appellate interference warranted

This appeal was against the order of the High Court, Kuantan which was for good allegedly sold and delivered by the appellant to the respondent. It was the appellant's case that the documents produced before the High Court amply proved the existence of the debt from the respondent. The learned senior assistant registrar allowed the appellant's claim but on the respondent's appeal, the judge concluded that there was an issue to go for trial.

Held, dismissing the appeal:

(1) The court is reluctant to entertain appeals against orders granting unconditional leave to defend which entail a re-examination of documentary and affidavit evidence raised before the High Court unless there is a question of law or where there are no disputes as to facts and the defence taken obviously lacks bona fides (see para 3).

(2) Having very carefully scrutinised the judgment under appeal, it was satisfied that the learned judge had not misdirected in point of principle or on the evaluation of evidence. In these circumstances, the court was convinced that appellate intervention was not warranted in this appeal. Hence, the appeal was dismissed (see para 6).

[Bahasa Malaysia summary

Rayuan ini adalah terhadap perintah Mahkamah Tinggi, Kuantan bagi barangan yang didakwa dijual dan dihantar oleh perayu kepada responden. Ianya adalah kes perayu bahawa dokumen-dokumen yang dikemukakan di Mahkamah Tinggi secukupnya membuktikan kewujudan hutang responden. Penolong kanan pendaftar yang bijaksana membenarkan tuntutan

perayu tetapi atas rayuan responden, hakim memutuskan bahawa terdapat isu untuk dibicarakan.

Diputuskan, menolak rayuan:

(1) Mahkamah keberatan untuk mendengar rayuan-rayuan terhadap perintah membenarkan permohonan tanpa syarat untuk membela yang mana melibatkan satu pemeriksaan semula bukti dokumentari dan afidavit yang dikemukakan di Mahkamah Tinggi kecuali jika terdapat persoalan undang-undang atau di mana tidak terdapat pertikaian berkenaan fakta-fakta dan pembelaan yang diambil secara jelas tidak mempunyai bona fides (lihat perenggan 3).

(2) Setelah meneliti secara berhati-hati penghakiman rayuan, adalah jelas bahawa hakim yang bijaksana tidak tersalah arah dalam poin prinsip atau dalam penilaian keterangan. Dalam keadaan ini, mahkamah yakin bahawa campur tangan rayuan tidak diwajarkan dalam rayuan ini. Oleh itu, rayuan ini ditolak (lihat perenggan 6)]

Notes

For cases on leave to defend, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 1169–1170.

Cases referred to

Malayan Insurance (M) Sdn Bhd v Asia Hotel Sdn Bhd [1987] 2 MLJ 183 (refd)

Societe des Etains de Bayas Tudjuh v Woh Heng Mining Kongsi [1978] 2 MLJ 267 (refd)

Appeal from: Civil Suit No 22–104 of 2004 (High Court, Kuantan).

Ong Siew Wan (Teh Ann Tong with him) (AT Teh & Associates) for the appellant.
N Chandran (N Surendan with him) (Edwin Lim & Suren) for the respondent.

Gopal Sri Ram JCA (delivering judgment of the court):

[1] This is the judgment of the court.

[2] This appeal is directed against the order of the High Court, Kuantan granting the respondent before us unconditional leave to defend the action. The subject matter of the claim in this case is for goods allegedly sold and delivered by the appellant to the respondent. It is the appellant's case that the documents produced before the High Court amply proved the existence of

A the debt from the respondent. The learned senior assistant registrar who heard the summons for judgment at first instance agreed with the appellant and entered judgment. On appeal by the respondent the judge in chambers, after full and careful examination of the whole of evidence before her came to the conclusion that there was an issue to go for trial.

B

[3] We have said often enough that this court will be most reluctant to entertain appeals against orders granting unconditional leave to defend which entail a re-examination of documentary and affidavit evidence raised before the High Court. It is only in very rare cases that this court will entertain such C appeals, for example where there is only a question of law or where there are no disputes as to facts and the defence taken obviously lacks bona fides.

[4] The proper approach to a summons to judgment has been set out in a D number of cases. No useful purpose will be served by a discussion of all of them here. Suffice that we quote from two well known authorities. The first is *Societe des Etains de Bayas Tudjuh v Woh Heng Mining Kongsi* [1978] 2 MLJ 267 at p 269, where Abdoolcader J said:

E > If a defendant, though he admits part of the plaintiff's claim, sets up a defence to the residue and a counterclaim for a larger amount than the part of the plaintiff's claim admitted, he is entitled to unconditional leave to defend as to the whole (*Court v Sheen* 7 TLR 556). When a bone fide counterclaim is set up arising out of the subject matter of the action and connected with the grounds of defence, F unconditional leave to defend should be given, even where the defendant admits part of the plaintiff's claim, as in such circumstances such admission is only subject to the counterclaim which might turn out to be larger in amount (*Court v Sheen*). Order 14 was not intended to shut out a defendant who could show that there was a triable issue applicable to the claim as a whole from laying his defence before the court, or to make him liable in such a case to be put on terms of paying into court G as a condition of leave to defend (*Jacobs v Booth's Distillery Co* 85 LT 262). Where there is clearly no defence to the plaintiff's claim, so that the plaintiff should not be put to the trouble and expense of proving it, but the defendant sets up a plausible counterclaim for an amount not less than the plaintiff's claim, the order should not be for leave to defend but should be for judgment for the plaintiff on H the claim with a stay of execution until the trial of the counterclaim (*Sheppards & Co v Wilkinson & Jarvis* (1889) 6 TLR 13).

[5] The second is, *Malayan Insurance (M) Sdn Bhd v Asia Hotel Sdn Bhd* [1987] 2 MLJ 183 at p 185 where Hashim Yeop A Sani SCJ (later CJ I (Malaya)), a judge of much learning had this to say:

> The underlying philosophy in the O 14 provision is to prevent a plaintiff clearly entitled to the money from being delayed his judgment where there is no fairly arguable defence to the claim. The provision should only be applied to cases where

there is no reasonable doubt that the plaintiff is entitled to judgment. Order 14 is not intended to shut out a defendant. The jurisdiction should only be exercised in very clear cases.

[6] Having very carefully scrutinised the judgment under appeal, we are satisfied that the learned judge had not misdirected herself in point of principle or on the evaluation of the evidentiary material before her. In these circumstances, we remain unconvinced that this is an appeal which warrants appellate intervention. We will therefore, without calling the respondent's counsel, dismiss this appeal. All orders made by the High Court are hereby affirmed. We were informed by learned counsel for the appellant that the action in this case has been set down for case management on 12 May 2008. We would make a consequential order directing the judge to fix the suit for hearing and have this case disposed of expeditiously.

Appeal dismissed.

Reported by Munira Mahmud